

¹ ALJ Order (Dec. 7, 2007) at 1.

working for a subsequent employer. Finally, they argue claimant failed to provide respondent with timely notice of his left knee injury as respondent did not receive notice of the alleged accident until July 30, 2007, which was several months after claimant left respondent's employment.

Conversely, claimant contends the December 7, 2007, Order should be affirmed. Claimant first argues he injured and aggravated his previously injured left knee due to a series of cumulative traumas that he sustained while working for respondent. Claimant's argument on that issue is summarized, as follows:

The evidence, consisting of the Claimant's testimony and the statements of Dr. Bradley Bruner and Dr. Pat Do, clearly establishes that Claimant's knee pathology was aggravated by his employment responsibilities of walking on uneven surfaces, walking over and under cables and in and out of trenches and squatting and kneeling over periods of eight to ten hours a day. Both Dr. Bruner and Dr. Do opine that the employment activities in question permanently aggravated, intensified and accelerated the Claimant's knee condition and that his need for medical care is causally related to such employment activities.²

Claimant next argues the date of accident for his cumulative trauma injury is controlled by K.S.A. 44-508(d) and deemed to be July 30, 2007, which was the date respondent received written notice of the alleged injury. Accordingly, claimant requests the Board to affirm the December 7, 2007, Order.

The issues before the Board on this appeal are:

1. Did claimant either injure or aggravate his left knee in an accident that arose out of and in the course of his employment with respondent?
2. If so, is the medical treatment that claimant now seeks related to that injury or aggravation?
3. What is the date of accident for this alleged repetitive or cumulative trauma injury and did claimant provide respondent with timely notice of the accidental injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds and concludes:

² Claimant's Brief at 12 (filed Jan. 28, 2008).

Claimant began working for respondent in July 2006 as a laborer. His job generally entailed digging trenches and laying fiber optic cables. In this proceeding, claimant contends that work aggravated his previously injured left knee.

Conversely, respondent and its insurance carrier deny any liability in this claim as they allege claimant's present need for medical treatment is directly related to an injury that claimant sustained while working for another employer. The record establishes that in May 2005 claimant injured his left knee while working as a baker for Panera Bread. As a result of that injury, in late June 2005 claimant underwent a left partial medial meniscectomy, which was performed by Dr. Pat D. Do.

Following surgery, however, claimant's knee complaints did not resolve. Indeed, claimant continued to experience left knee problems even after Dr. Do released him from medical care without any permanent work restrictions in early October 2005. Indeed, claimant believed his symptoms actually worsened after that surgery.³ Nonetheless, despite his ongoing left knee problems, claimant resumed his job with Panera Bread and continued to work until he was terminated in early March 2006.

Claimant's ongoing left knee problems are noted by Dr. C. Reiff Brown, who examined claimant in both November 2005 and April 2006. In November 2005, claimant reported to Dr. Brown that he had returned to work and was continuing to have left knee pain. Claimant told the doctor that the more he worked, the more discomfort and swelling he would have at the end of the day. The doctor noted claimant was having occasional catching in his knee but it was not locking. Dr. Brown concluded claimant should have an orthopedic consultation with someone specializing in lower extremity care.

Claimant next saw Dr. Sandra Barrett, who specializes in physical medicine and rehabilitation. Dr. Barrett saw claimant in March 2006 and noted claimant had left knee pain that was worse at the end of the day and occasional left knee popping. Dr. Barrett diagnosed claimant as having undergone a partial medial meniscectomy and also having patellofemoral syndrome. The doctor rated claimant's left lower extremity and, more importantly, recommended that claimant only occasionally kneel and squat.

When Dr. Brown examined claimant a second time, which was in April 2006, the doctor was disappointed claimant had not yet seen an orthopedic specialist. During that examination, the doctor found tenderness and crepitus in claimant's left knee. The doctor also found claimant's left thigh was smaller than his right thigh and that he walked with a mild left-sided limp. Claimant told Dr. Brown he had disabling symptoms when he walked for two miles and that he had to get out and walk around periodically on long rides. Again,

³ P.H. Trans. at 33.

Dr. Brown concluded further orthopedic evaluation was required to determine whether claimant needed another arthroscopic procedure on his knee.

Despite ongoing problems with his left knee, claimant commenced his employment with respondent. Claimant testified his left knee symptoms worsened due to the work he performed for respondent.

If I had to crawl out of a ditch, it increasingly worsened. If I stepped on an uneven surface, it increasingly worsened. If I walked over a pit or a trench and the dirt gave way and my foot went into the hole, it increasingly worsened at that time --.

. . . .

I mean two or three times a day it could happen, just because when you cover the ditch back up or the trench back up, you've got dirt mounted up over the hole; you think that it's packed in there, and you step in it and you sink down into the hole, so it would twist your knee or make your ankle move or whatever it was that, you know, that you stepped into it.⁴

Unquestionably, claimant was experiencing symptoms in his left knee before he began working for respondent and those symptoms were significant enough that Dr. Brown believed claimant needed further evaluation by an orthopedic surgeon who specializes in the lower extremities. And while employed by respondent, claimant never requested respondent to provide him medical treatment for his left knee or even mentioned to any of his supervisors that he believed the work was hurting his knee. In fact, claimant initially brought a workers compensation claim against Panera Bread. And in a preliminary hearing held in that claim on June 12, 2007, claimant testified he did not think he had injured himself working for respondent.

Q. (Mr. Worth) Okay. I was on the right track before. I'll again reference your testimony at page 26 in that [June 12, 2007] preliminary hearing statute -- sorry, preliminary hearing transcript. The question posed to you by Mr. Kinch that day was as follows: "Mr. Sweet, let me ask you this. Was there any difference between the condition of your knee in the work place after your surgery and before your termination by Panera Bread? Is there any difference between your condition at that time and your condition during the course of your employment for Diamond Engineering?" And your answer was no. So your testimony at that prior hearing was that your condition did not change in any way in your left knee during the time you worked at Diamond Engineering as compared to what it was when you left your employment at a Panera Bread. And that was a true statement, wasn't it, sir?

⁴ *Id.* at 50-52.

A. (Claimant) Yes.⁵

Nonetheless, claimant explained that what he actually meant was that he had not been hit by anything, did not fall down, and did not receive any injury that caused him to go to the hospital or consult with a doctor.⁶

The medical opinions of three doctors were presented at the November 15, 2007, preliminary hearing. Dr. Bradley W. Bruner examined claimant in March 2007 and recommended an MRI, bone scan, and potential surgery. In a letter that was provided Panera Bread's attorney for purposes of that claim, Dr. Bruner indicated claimant's present need for medical treatment was related to claimant's employment at respondent and/or Logistics Resources, Inc. (claimant's subsequent employer). Similarly, Dr. Pat D. Do expressed the same opinion.

Dr. Paul S. Stein, who examined claimant in November 2007 at respondent and its insurance carrier's request, concluded claimant's need for medical treatment is the result of his injury at Panera Bread. When asked if the work at respondent changed his condition, claimant told Dr. Stein "I didn't never hurt it at Diamond."⁷ As set forth in his medical report, Dr. Stein reasoned that claimant was substantially symptomatic at the time that he started working for respondent and that it was not unexpected that his knee would hurt more at the end of the workday, as it did when he was at Panera Bread. Moreover, the doctor found no basis to believe there was any permanent aggravation of claimant's left knee condition by his subsequent employment at Logistics Resources, Inc.

Claimant needed medical treatment to his left knee before he began working for respondent. And despite the fact claimant further aggravated his left knee working for respondent, the greater weight of the evidence establishes that the present need for medical treatment is related to the injury he sustained at Panera Bread.

The undersigned agrees with respondent and its insurance carrier that the causation opinions of both Dr. Bruner and Dr. Do were based upon incomplete facts. At the time they provided their opinions it is questionable whether the doctors knew about the symptoms, or their severity, claimant was experiencing before he commenced working for respondent. Likewise, it is questionable whether Dr. Bruner and Dr. Do knew Dr. Brown had recommended additional medical treatment as early as November 2005 and again in

⁵ *Id.* at 42.

⁶ *Id.* at 40, 41.

⁷ *Id.*, Cl. Ex. 6 at 2.

April 2006. Accordingly, at this juncture the opinions of Dr. Bruner and Dr. Do should be given little weight.

In summary, the undersigned finds claimant needed medical treatment before commencing employment with respondent and the greater weight of the evidence indicates that such medical treatment is directly related to the injury that claimant sustained while working for Panera Bread. Based upon that finding, the issues surrounding the appropriate date of accident and timely notice are moot.

It appears Panera Bread is defending its claim on the basis that claimant's present need for medical treatment is related to his work for respondent and that respondent is defending this claim on the basis the medical treatment is related to claimant's injury at Panera Bread. Accordingly, the undersigned suggests the Judge and parties consider consolidating the claims to avoid the awkward and inconsistent result that has now occurred.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned finds claimant has failed to prove his present need for medical treatment is related to the work he performed for respondent. Accordingly, the December 7, 2007, Order is reversed.

IT IS SO ORDERED.

Dated this ____ day of March, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: E. L. Lee Kinch, Attorney for Claimant
Brooke L. Grant, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

⁸ K.S.A. 44-534a.